NO. 83-5449

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILLIE LEE RICHMOND,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When the death penalty may be upheld upon the basis of two other aggravating circumstances, does petitioner raise a federal question by showing dissent among the Arizona Supreme Court about a third one?

2. Does any decision of this Court require that a state supreme court, or a sentencing judge, believe a defendant's proffered mitigation and give it sufficient weight to reduce the penalty to life?

3. Does the Constitution require unanimous appellate affirmance of the death penalty?

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STATEMENT OF THE CASE

Petitioner's statement of the case is basically correct. The two aggravating circumstances upon which the Arizona Supreme Court unanimously agreed were Ariz.Rev.Stat.Ann. § 13-703(F)(1) and (2). The facts sustaining those circumstances -- which petitioner never challenges and chooses to ignore -- are the first-degree murder of Mary Dawson in July 1973, prior to the murder for which petitioner received the death penalty, and the armed kidnapping of Raul Granados in 1969. State v. Richmond, 112 Ariz. 228, 540 P.2d 700 (1975). Petitioner also fails to point out that the record in the instant case establishes that he, then 25, was living with Faith Erwin, 15, regularly "fixing" with her, and, at least part of the time, receiving the earnings of her prostitution. Indeed, the murder of Bernard Crummett, the case before this Court, arose out of a scheme concocted by Richmond and Becky Corrella whereby, at Richmond's direction, she agreed to prostitute herself to Crummett.

Petitioner previously sought certiorari in this case, and this Court denied it. 433 U.S. 915 (1977).

In his attempt to have this Court grant certiorari, Richmond constantly and conveniently ignores a very salient fact: all five justices of the Arizona Supreme Court agreed that the state had proven two aggravating factors, the former murder of Mary Dawson and the armed kidnapping of Raul Granados. To support his arguments, he must of necessity focus upon the one circumstance about which, for factual reasons, the Arizona Supreme Court disagreed, glossing over the fact that two of the three justices who disagreed about the existence of the especially heinous factor did concur that his prior record set him above the norm of murderers and warranted death. State v. Richmond, ___ Ariz. ___, 666 P.2d at 67-69. (Concurrence of

Justice Cameron and Vice Chief Justice Gordon.) That left in dissent only Justice Feldman, who also agreed that the state had proven two aggravating factors.

REASONS FOR DENYING THE WRIT

A. Uniqueness of Petitioner's Case.

Petitioner's emphasis upon the uniqueness of his case, with respect to the applicability of one aggravating circumstance out of three, is one of the strongest arguments for denying the writ. If he could show that the Arizona Supreme Court is constantly divided about the definition (and he never challenges the definition of that particular circumstance) or the application of the definition to the facts, he would have a more persuasive case because that might indicate vacillation and uneven application of Ariz.Rev.Stat.Ann. § 13-703(F)(6). But he concedes the uniformity of definition, and, except for his case, the uniformity of application to the facts of all cases preceding and following his. Thus, his argument is that this Court should grant certiorari because, for the first time, the Arizona Supreme Court has split upon the resolution of whether the facts (and inferences therefrom) sustain the conclusion that he committed the murder in an especially heinous manner. That is an extremely weak basis for invoking alleged infringement of federally protected rights. Respondent will demonstrate, infra, that recent decisions of this Court clearly indicate this Court does not intend to involve itself in this kind of state evidentiary question in the absence of extraordinary circumstances, which are not present in this case.

Respondent must express a caveat to the Court as it reads pages 5-14 of the petition. The caveat is necessary because counsel for petitioner distorts the statutory and case law of Arizona to induce this Court to believe that Arizona courts pay little attention to any aggravating circumstance except

that one concerned with whether the crime was especially cruel, heinous, or depraved. Counsel apparently felt compelled to take this approach in order to divert attention from the two aggravating circumstances upon which the Arizona Supreme Court unanimously agreed.

Respondent will trace the development of this semantic strategy. At page 5 of the petition, petitioner fleetingly acknowledges that the Arizona statute accords no priority to the seven aggravating factors that make one eligible for the death penalty. Ariz.Rev.Stat.Ann. § 13-703(F)(1)-(7). Any one of those factors requires imposition of death unless the defendant can produce mitigation substantial enough to merit leniency. Ariz.Rev.Stat.Ann. § 13-703(E). The trial court has no authority to accord any particular aggravating circumstance more or less weight than another because any of the seven mandates death in the absence of substantial mitigation. Having accurately stated that the statute itself permits no priority among aggravating factors, counsel then begins to weave a subtle thread upon the loom of distortion. That thread conveys both implicitly and explicitly the following message: the one decisive factor that separates death penalty cases from "normal" first-degree murder is the circumstance of especially cruel, heinous, or depraved. That is to say, by inference, that Arizona courts almost never impose death unless that one circumstance is established. That is false both legally and factually. Clear evidence of this misleading syllogism is at pages 5, 7, 13-14 of the petition. When petitioner says the Arizona Supreme Court has often indicated that 13-703(F)(6) is "the one which separates a death penalty case from a 'normal' first-degree murder," he distorts by omission. Petition at 5. The Arizona Supreme Court has said that circumstances that separate a particular murder from other murders may be proved

by establishing the existence of Ariz.Rev.Stat.Ann. § 13-703(F)(6). Petitioner skillfully converts this into what separates a death penalty case from other murders, i.e., if the evidence satisfies that one circumstance, the defendant will receive death regardless of any other aggravation or mitigation. Petitioner continues this theme at page 7 by saying that his case presents a "critical disagreement . . . about the existence of the one aggravating factor which the Court has said separates 'normal' first-degree murder cases from death penalty cases." (Emphasis supplied.) Petitioner cites no case because there is no case that holds that one factor is the sole factor that determines that a defendant will receive the death penalty despite other aggravation or mitigation. At page 13 petitioner reiterates this same reasoning by saying "this particular circumstance carries special weight in Arizona's death penalty sentencing scheme, since it is the factor which separates death penalty cases from that of a 'normal' first-degree murder." (Emphasis supplied.) Again, petitioner employs the definite article, semantically undergirding the false syllogism he wishes this Court to accept uncritically. What Arizona case says that Ariz.Rev.Stat.Ann. § 13-703(F)(6) carries special weight? None. To so hold would be to say that that individual circumstance makes defendants more eligible for death than others, a distinction the statute does not allow. Less there be any doubt that counsel for petitioner attempts to convince this Court that, statutory language and case law to the contrary, the true and exclusive factor that Arizona courts rely upon to impose death is especially cruel, heinous or depraved, respondent invites consideration of the following except from page 14 of the petition:

> Petitioner submits that even if the other aggravating factors in this case were properly demonstrated, resentencing is necessary because the one factor which elevates a "normal" first degree murder from [sic] an "abnormal" (and thus death-qualifying) murder was not constitutionally found.

(Emphasis supplied.) Undeniably, petitioner is saying that only the establishment of Ariz.Rev.Stat.Ann. § 13-703(F)(6) will result in imposition of death (the one factor that is "death qualifying") regardless of additional aggravating factors, in this case, two. That is neither factually nor legally correct. Any of the seven factors listed in Ariz.Rev.Stat.Ann. § 13-703(F) makes a defendant eligible for death, indeed, mandates it, unless the defendant produces sufficient mitigation.

Petitioner lists four cases in which the death penalty was sustained on factors other than especially cruel, heinous, or depraved. Petition, page 6, n.1. He omitted the following cases: State v. Britson, 130 Ariz. 380, 636 P.2d 628 (1981); State v. Smith (Sylvester), 125 Ariz. 412, 610 P.2d 46 (1980); State v. Evans, 120 Ariz. 158, 584 P.2d 1149 (1978), affirmed after remand, 124 Ariz. 526, 606 P.2d 16 (1980). That makes seven cases sustained on appeal that do not contain the factor of especially cruel, heinous or depraved. In addition, the Arizona Supreme Court has sustained convictions in three other cases in which the trial court imposed death on the basis of a single circumstance -- not Ariz.Rev.Stat.Ann. § 13-703(F)(6) -- but has remanded those for resentencing for other reasons. State v. Hensley, No. 5556 (Ariz.Sup.Ct., June 30, 1983); State v. Smith (Roger), ___ Ariz. ___, 665 Ariz. 995 (1983); State v. McMurtrey, ___ Ariz. ___, 664 P.2d 637 (1983). Petitioner does not inform this Court that, of

those cases involving Ariz.Rev.Stat.Ann. § 13-703(F)(6), all but five involved additional aggravation, usually prior convictions for violent crimes (as in petitioner's case) and the motive of pecuniary gain. See, e.g., State v. Harding, No. 5587 (Ariz.Sup.Ct., Sept. 6, 1983); State v. Adamson, ___ Ariz. ___, 665 P.2d 972 (1983); State v. Gerlaugh, 134 Ariz. 164, 654 P.2d 800, supp. opinion, 135 Ariz. 89, 659 P.2d 642 (1983); State v. Carriger, 132 Ariz. 301, 645 P.2d 816 (1982); State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), cert. denied, 102 S.Ct. 2259 (1982); State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (1981); State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067 (1980); State v. Jordan, 126 Ariz. 283, 614 P.2d 825 (1980); State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980). Of the more than fifty people on death row, only five have had their sentences affirmed upon the sole basis of Ariz.Rev.Stat.Ann. § 13-703(F)(6). State v. Lambright, No. 5594 (Ariz.Sup.Ct., Sept. 28, 1983); State v. Smith (Robert), No. 5595 (Ariz.Sup.Ct., Sept. 28, 1983); State v. Jeffers, ___ Ariz. ___, 661 P.2d 1105 (1983); State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980); State v. Knapp, 127 Ariz. 65, 618 P.2d 235 (1980). So much for the argument that the Arizona Supreme Court affirms the death penalty in exclusive reliance upon that one circumstance.

Petitioner could have given this Court an accurate description of the basic criteria utilized by the Arizona Supreme Court on review by stating that that court will not affirm a death sentence unless, either the circumstances of the murder set it apart (the only criteria Richmond mentions), or the record and character of the defendant set him apart from other murderers. State v. Richmond, ___ Ariz. ___, 666 P.2d 57, 67-68 (1983) (Justice Cameron's

concurring opinion); State v. Zaragoza, 135 Ariz. 63, 68, 659 P.2d 22, 27-28 (1983); State v. Watson, 129 Ariz. 60, 63, 628 P.2d 943-46 (1981). It was Richmond's prior record for violence, another first-degree murder and armed kidnapping, that prompted Justice Cameron and Vice Chief Justice Gordon to concur with Holohan and Hays that death was appropriate. 666 P.2d at 67-68.

Finally, petitioner notes four cases in which the Arizona Supreme Court set aside the trial court's finding of Ariz.Rev.Stat.Ann. § 13-703(F)(6) and imposed life sentences. In two of those cases, the Arizona Supreme Court found no aggravating circumstances, thus, there was no statutory basis for sustaining death. State v. Madsen, 25 Ariz. 346, 609 P.2d 1046 (1980); State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979). In State v. Watson, supra, the court sustained two of four factors. Both factors were based on a robbery Watson committed. In the last case, the Arizona Supreme Court upheld one aggravating circumstance, a conviction for possession of marijuana for sale, and determined that the defendant suffered from a neurological lesion that was a "major contributing cause of his conduct." State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979).

It is within the foregoing context, especially in view of the fact that the Arizona Supreme Court unanimously agreed about the existence of two additional aggravating factors in petitioner's case, that this Court should consider petitioner's arguments.

B. Disagreement about whether a particular set of facts satisfies a circumstance is not tantamount to proof that the circumstance is unconstitutionally vague.

Although petitioner divides this argument into two parts, he says the same thing in both. He claims that because there was disagreement among the Arizona justices about whether the facts of this case fell within the ambit of Ariz.Rev.Stat.Ann. § 13-703(F)(6), that makes the "application" of that circumstance unconstitutional. The second point he asserts is that that circumstance is vague. This he purports to demonstrate by showing the "history" of its application in his case. Petition at 12. This second proposition is simply the first one restated. Both premises hinge upon whether disagreement about what the facts show renders unconstitutional the statutory definition of especially cruel, heinous, or depraved.

Petitioner has already defeated his argument by earlier emphasizing the continuing unanimity of the Arizona Supreme Court in defining and applying this circumstance. He has told this Court more than once that his case is unique because it is the only one where justices have not agreed about applicability of this particular circumstance. Petition at 5-7. The Arizona Supreme Court has considered at least 29 cases involving this circumstance, and has either unanimously upheld or rejected it. This indicates vagueness? The Court will note that petitioner never attacks the definitions developed by the Arizona Supreme Court; he simplistically equates differing interpretations of the facts with unconstitutional statutory vagueness. That is a nonsequitur.

None of the five Arizona justices disagreed that the murder involved ghastly mutilation of the victim. Evidence

showed that petitioner drove a car over Crummett's skull, then, 30 seconds later, from another direction, drove over his chest. The point of dissension between the two justices who found the circumstance applicable and those who did not was whether the facts supported the inference that Richmond knew the first pass killed Crummett and made the second run for the express purpose of mutilating the corpse. Two justices believed that a supportable inference from the facts (especially considering the 30-second interval and the fact that the car ran over the victim from different directions), and three did not. 666 P.2d at 64, 68. In previous cases involving mutilation, the record left no doubt that the defendants either inflicted great pain upon the victims before they died, or knew their victims were dead and continued to inflict gratuitous violence. See, e.g., State v. Gerlaugh, supra; State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980). Neither the concurring opinions nor the dissenting opinion indicates disagreement about the definition of Ariz.Rev.Stat.Ann. § 13-703(F)(6), only a difference about Richmond's knowledge and state of mind when he drove over Crummett the second time. Upon the facts, either position is sustainable.

DISAGREEMENT OVER FACTS

The Arizona Supreme Court has taken great care in defining and applying this particular circumstance, especially mindful of this Court's holding in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). State v. Gretzler, 135 Ariz. 42, 659 P.2d 1, 9-12 (1983); State v. Ortiz, supra. Godfrey, supra, has no bearing upon this case. There, the Georgia Supreme Court had evolved a limited definition of a roughly similar circumstance that restricted application of it to instances

of aggravated battery or torture upon live victims. This Court reversed because the state conceded Godfrey's victims died instantly from shotgun blasts to the head:

> The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself in the Harris and Blake cases.

446 U.S. at 432, 100 S.Ct. at 1767. There was no room, as in this case, to draw different inferences from undeniable facts because of the restrictive definition Georgia had placed upon that particular circumstance. A second important consideration is that the Georgia Supreme Court had affirmed the death penalty relying exclusively upon that circumstance. Here, there are two additional aggravating factors not disputed by any member of the Arizona Supreme Court or petitioner. Justice Stewart noted that Godfrey intimated no authority for cases that could be sustained upon other aggravating factors. Id. at 432, n.15, 100 S.Ct. at 1767, n.15.

Even if one could characterize, merely arguendo, the conclusion of the two justices who found Ariz.Rev.Stat.Ann. § 13-703(F)(6) applicable as an error of state law, "mere errors of state law are not the concern of this Court, . . . unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 3428, 77 L.Ed.2d 1134 (1983). When, as here, the death penalty is easily sustainable upon the prior record of the defendant as exemplified by two additional circumstances, this Court should deny the writ. Neither the trial court nor the Arizona Supreme Court considered inadmissible evidence; surely the method of murder is a proper area for inquiry. Since even total elimination of

this one circumstance would not change the result, the Court should deny the writ. Barclay v. Florida, supra; Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Petitioner invites this Court to engage in a case-by-case comparison to see with which group of Arizona justices it might agree upon the facts of this case. Rejecting a similar invitation, the Eleventh Circuit aptly said:

> In regard to the judge's consideration of aggravating circumstances, Adams faults the judge for finding the murder "especially heinous, atrocious, or cruel." In upholding the trial judge's finding, however, the Florida Supreme Court properly noted that Adams had killed his victim "by beating him past the point of submission and until his body was grossly mangled." Adams v. State, 341 So.2d at 769. Although Adams argues there are Florida cases with similar facts which were not held to be "especially heinous, atrocious, or cruel," it is not the role of the federal courts to make a case-by-case comparison of the facts in a given case with other decisions of the state supreme court. Ford v. Strickland, 696 F.2d at 819; Spinkellink v. Wainwright, 578 F.2d 582, 604-05, cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

Adams v. Wainwright, 709 F.2d 1443, 1447 (11th Cir. 1983). This Court should likewise decline, especially when petitioner has conceded the uniform definition and application of this circumstance and wishes this Court to "referee" a disagreement both sides of which find support in irrefutable facts.

C. The trial court considered the proffered mitigation and did not find it persuasive.

This entire argument may be capsulized by stating that petitioner complains that the trial court had to believe his mitigation, and, more importantly (by implication, at least), was obliged to conclude his proffered mitigation

outweighed the aggravation. No decision of this Court has ever so held. This Court has said the sentencer must consider, not that he must believe, and certainly not that he must assign a particular weight to the defendant's evidence. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Petitioner again distorts the record by saying that the question is whether the sentencing judge can impose death when he "fails to consider, as a mitigating factor uncontradicted evidence . . . ." and "the sentencing judge could somehow disregard the evidence and fail to take it into account in assessing the propriety of the death penalty." Petition at 15 (emphasis added). In view of the record, such assertions are nonsense. The trial court listened to and considered extensive testimony from petitioner and a host of others about his alleged change of character. The trial court simply was not convinced of that change, or, at the very least, that such a change was sufficient to overcome the aggravation. The plurality opinion, noting that the trial court observed all witnesses, had no difficulty in sustaining the trial court's refusal to find the evidence persuasive. State v. Richmond, 666 P.2d at 65-66. But it is clear that the trial court did consider the proffered mitigation.

Petitioner's argument amounts to nothing more than asking this Court to reevaluate the record, believe his mitigation, and conclude that it does outweigh the aggravation. Indeed, petitioner flatly asks this Court to reduce his sentence to life. Petition at 13. If this Court is going to determine the credibility of witnesses and evidence in state proceedings, perform an independent weighing process and proportionality review for every state

death penalty case, perhaps it would be more appropriate and expedient for Congress to enact preemptive legislation stripping state tribunals of appellate jurisdiction in these cases and channeling them all directly to this Court. With regard to federal habeas corpus proceedings brought by state prisoners, this Court has made it clear that it is not the province of federal courts to reassess the credibility of witnesses and testimony the state trial court heard first hand. Maggio v. Fulford, ___ U.S. ___, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983); Marshall v. Lonberger, ___ U.S. ___, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). See also United States v. Oregon Medical Society, 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed.2d 978 (1952).

As he must, petitioner emphasizes Justice Feldman's dissent and tries to analogize his case to that of the defendant in State v. Watson, supra. The only observation to make about Feldman's dissent is that he believed -- without seeing any witness testify -- the proffered mitigation and thought it warranted a life sentence. The four remaining justices did not. Dissent among an appellate tribunal is hardly novel. The four justices who concurred in the imposition of the death penalty were aware that the defendant in State v. Watson, supra, had presented similar testimony about changed character. They were also aware that Watson had not been convicted of another first-degree murder. 666 P.2d at 66, 68-69. That those four justices, in weighing all factors, arrived at a different assessment from that of Justice Feldman, presents no federal question.

D. Affirmance of the death penalty by a less-than-unanimous appellate court does not violate the Sixth and Fourteenth Amendments.

Offering a novel argument, Richmond likens appellate review to those states that require a unanimous jury recommendation of death. If he had been sentenced by the Arizona Supreme Court, he muses, he could not have received the death penalty because one justice dissented. His argument overlooks two elements: (1) This Court has never said, even in death penalty cases, that a unanimous guilt or sentencing jury is constitutionally required. In upholding cases involving nonunanimous guilt verdicts, the Court has noted that state provisions for unanimous verdicts in capital cases serve a rational purpose, but it has never held that unanimous sentencing verdicts in capital cases are constitutionally mandated. Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972); (2) If Richmond had been sentenced by a jury immediately after a finding of guilt, that jury would have made no proportionality study (as does the Arizona Supreme Court in every capital case), nor could he have presented testimony about his model conduct in the intervening 9 years because those would not have passed. Petitioner's argument is another transparent attack upon judge sentencing, already rejected by this Court. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The state can readily see that all defendants would prefer jury sentencing because it increases their chances of persuading at least one person to dissent.

The question, however, is not jury sentencing, but appellate review. Richmond does not consider the reverse of his argument: if a unanimous jury has recommended death, should this Court draw from the penumbra of the

Sixth Amendment a new constitutional principle, to be applicable to states through the Fourteenth Amendment, that as a matter of federal constitutional law, a divided appellate court automatically nullifies a unanimous jury sentence of death? Concerned as he is with his own case, petitioner has not considered the ramifications of the Court's undertaking to do what he asks. No state has seen fit to require that its supreme court unanimously affirm a death sentence. Surely the legislatures of the 31 states that have jury sentencing were aware that their highest appellate courts would review the jury's sentence.[1] Could this be mere oversight on the part of so many state legislatures? Petitioner maintains that Arizona's constitution, which does require unanimous jury verdicts in criminal cases, contains an inherent federal violation in its application. Petition at 20. Obviously, he means -- and wishes this Court to say -- that the federal constitution demands a unanimous appellate court to uphold the death penalty, as well as a unanimous jury verdict. Why not extend the analogy to federal habeas proceedings initiated by a state prisoner under sentence of death? If the federal appeals court, en banc, cannot unanimously agree that the state permissibly imposed the death penalty, that, too, automatically reduces the sentence to life. The

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[1] In Arizona, Idaho, Montana, and Nebraska, the trial court sentences the defendant in a capital case. Florida and Alabama provide for non-binding advisory jury opinions, but the trial court decides the sentence. Ala.Code § 13A-5-46(e), 13A-5-47(e); Ariz.Rev.Stat.Ann. § 13-703(B); Fla.Stat.Ann. § 921.141(2) (West 1972); Idaho Code § 19-2515; Mont. Code Ann. § 46-18-301; Neb.Rev.Stat. § 29-2520.

possibilities are no doubt attractive to all defendants in petitioner's position.

This Court has affirmed numerous death penalties, with two justices perpetually dissenting. This presents an intriguing potentiality petitioner does not mention. States have the right to death-qualify juries to eliminate panelists unalterably opposed to the death penalty. However, most state supreme court appointments are political. The prosecution could do nothing about a state supreme court justice unwilling to impose death in any situation. If such a justice continually dissented from affirmance of capital cases, should that reduce all such cases that come before that court during the tenure of that justice to life? A positive response would make the death-qualifying process at the trial level meaningless in those states that permit the jury to decide sentence, and the trial court's judgment meaningless in those six where the trial court determines sentence. Although the question was not before this Court in those two cases, respondent notes that Justice Gunter dissented in Stephens v. State, 227 S.E.2d 261, 264 (Ga. 1976), later affirmed by this Court in Zant v. Stephens, supra, and the advisory jury in Florida recommended by a 7-5 vote that Barclay receive life. 103 S.Ct. at 3421. Nevertheless, the Florida trial judge imposed death, the Florida Supreme Court affirmed, and this Court affirmed. Barclay v. Florida, supra.

CONCLUSION

Ignoring the fact that no Arizona justice disagreed that the state had shown two aggravating circumstances, petitioner falsely alleges that the Arizona Supreme Court gives "special weight" to the one circumstance about which that court disagreed. The uniqueness of that disagreement

-- which has occurred neither before nor since petitioner's case -- emphasizes the uniformity of definition and application of that circumstance by the Arizona Supreme Court. Petitioner is clamoring that one instance of discord about the state of mind the facts estabish, implies unconstitutional vagueness.

It would be inappropriate for this Court to undertake a de novo review of the record to independently assess witnesses' credibility and to substitute its judgment for that of the trial court and the Arizona Supreme Court in balancing aggravation against mitigation. Indeed, two members of this Court would not affirm the judgment regardless of aggravation. Petitioner demonstrates no constitutional violation -- he merely wants everyone to agree with Justice Feldman.

Common sense militates against the proposition that appellate courts must unanimously affirm sentences of death.

Respondent contends that petitioner has not raised a federal question, nor shown violation of a federally protected right. The Court should deny the writ.

Respectfully submitted,

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A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JACK ROBERTS, being first duly sworn upon oath, deposes and says:

That he served the attorney for the appellant in the foregoing case by forwarding two (2) copies of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

LAWRENCE H. FLEISCHMAN
Deputy Public Defender
45 W. Pennington, 3rd Floor
Tucson, Arizona 85701
Attorney for PETITIONER

this 20th day of October, 1983.

Jack Roberts
JACK ROBERTS

SUBSCRIBED AND SWORN to before me this 20th day of October, 1983.

Elizabeth J. Bender
NOTARY PUBLIC

My Commission Expires:
July 17, 1986

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